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In The
Supreme Court of the United States

NEBRASKA TELECOMMUNICATIONS ASSOCIATION AND NEBRASKA CABLE COMMUNICATIONS ASSOCIATION,

Petitioners,

vs.

CITY OF LINCOLN, NEBRASKA, d/b/a LINCOLN ELECTRIC SYSTEM,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HARDING, SHULTZ & DOWNS and
JACK L. SHULTZ
Counsel of Record
GREGORY D. BARTON
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000
Attorneys for Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

On April 30, 2003, Petitioners the Nebraska Telecommunications Association (the "NTA") and the Nebraska Cable Communications Association ("NCCA") filed their Petition for Writ of Certiorari with this Court. Petitioners are asking the Court to resolve the question of whether Congress intended to preempt the historic powers of the States to regulate their own political subdivisions, in enacting 47 U.S.C. § 253(a), which precludes state or local laws that prohibit or have the effect of prohibiting the ability of "any entity" to provide interstate or intrastate telecommunications service.

On May 23, 2003, Respondent the City of Lincoln, Nebraska, d/b/a Lincoln Electric System ("LES") filed its Brief in Opposition to the Petition for Writ of Certiorari of the NTA and the NCCA.[1] LES has raised two primary contentions: (1) the Nebraska Supreme Court's decision purportedly rests on an independent and adequate state law ground; and (2) the conflict between the lower federal and state courts regarding the scope of federal preemption under 47 U.S.C. § 253(a) is purportedly "less than it appears." (LES's Brief, at p. 20.)

This Reply Brief is respectfully submitted on behalf of Petitioners the NTA and the NCCA. For the reasons discussed in detail below, LES's arguments are without

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[1] LES filed a combined Brief in opposition to the Petition for Writ of Certiorari filed by the NTA and the NCCA, and the separate Petition for Writ of Certiorari filed by the Nebraska Public Service Commission, which is docketed at Case No. 02-1599.

merit and should be rejected, and the Petition for Writ of Certiorari should be granted.

ARGUMENT

1. THE NEBRASKA SUPREME COURT'S FEDERAL PREEMPTION HOLDING WAS INTEGRAL TO THAT COURT'S DISPOSITION OF THE MATTER.

LES admits that the Nebraska Supreme Court had to resolve the issue of federal preemption under 47 U.S.C. § 253(a) ("[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"). (LES's Brief, at pp. 7-8 and 10-12.) Nevertheless, LES asserts that the decision below rested upon an adequate and independent state law ground since, after resolving the federal preemption issue, the Nebraska Supreme Court also held that, "because LES has not been authorized by ordinance to seek regulatory authority to provide such services, the Commission properly denied its application." (App. 24; *In re Application of Lincoln Electric System*, 265 Neb. 70, 82, 655 N.W.2d 363, 373.) LES's "adequate and independent state law ground" contentions are contrary to the Nebraska Supreme Court's treatment of the issues below and to this Court's precedent.

The dependence of the state law ground upon which the Nebraska Supreme Court ultimately disposed of the appeal is clearly shown by the decision below. The Nebraska Supreme Court believed that the federal preemption issue was the key threshold issue on appeal, stating that "[u]nless LES is correct in its assertion that these

[state] statutory provisions are preempted by federal law, *the single issue presented in this appeal" of whether LES lacked the legal authority under state common law to operate as a for-hire telecommunications carrier "would be moot.*" (App. 6; 265 Neb. at 75, 655 N.W.2d at 368-369) (emphasis added). Thus, the Nebraska Supreme Court recognized that its ability to even reach the state common law issue on appeal was wholly dependent on how the court resolved the federal preemption issue.[2]

In similar circumstances, this Court has held that a state court's federal-law holding was integral to the disposition of the matter, such that the Court had jurisdiction to review the federal question. In *Intern. Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380 (1986), a discharged ship superintendent sued his union for fraud and misrepresentation. Following a jury trial, a verdict was entered in the superintendent's favor. The union then moved for a judgment notwithstanding the verdict on the ground that the superintendent's lawsuit was preempted by the National Labor Relations Act. The trial court ruled that the union had waived its preemption claim by failing

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[2] LES, itself, has acknowledged the interdependence between the federal and state law issues resolved below. In its Brief, LES concedes that, in order for the Nebraska court to reach the "state municipal law" question, "*the court first had to address LES' preemption challenge* to the recently enacted statutory prohibition against municipal telecommunications services found in L.B. 827," and the "Nebraska Supreme Court was *forced to address the preemption question* because the legislature enacted L.B. 827 while LES' appeal was pending." (LES's Brief, at pp. 7 and 11) (emphasis added).

to assert preemption as an affirmative defense, and the Alabama Supreme Court affirmed.

After the union appealed to this Court, the superintendent moved to dismiss the appeal on the ground that the decision below rested upon an adequate and independent state ground "because the Alabama Supreme Court's decision was based on an application of a state procedural rule." *Davis*, 476 U.S. at 386. The *Davis* Court held that it had jurisdiction to review the Alabama court's federal preemption holding for reasons which are instructive in this case:

> . . . [A] determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. *Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question.*
>
> If the Alabama procedural ruling under state law implicates an underlying question of federal law, however, the state law is not an independent and adequate state ground supporting the judgment:
>
> "[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S. Ct. 1087, 1092, 84 L.Ed.2d 53 (1985) (citing *Herb v. Pitcairn, supra*, 324 U.S., at 126, 65 S. Ct.,

> at 463; *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 320, 61 L.Ed. 644 (1917)).
>
> To determine the sufficiency of the state procedural ground relied upon by the Alabama Supreme Court *we must ascertain whether that court correctly resolved the antecedent federal question* regarding the nature of *Garmon* preemption under the NLRA.

Davis, 476 U.S. at 388 (emphasis added). *See also Ohio v. Reiner*, 532 U.S. 17 (2001) (the Court has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law").

In *Davis*, the Alabama Supreme Court had to first resolve the federal issue of whether *Garmon* preemption was a waivable affirmative defense, before the Alabama court could reach the issue of whether such a waiver had occurred under state procedural law. Similarly, in this case, the Nebraska Supreme Court had to first resolve the federal issue of whether § 253(a) preempted state statutes which preclude a political subdivision from receiving a permit as a telecommunications contract carrier, before the Nebraska court could reach the issue of whether LES had the legal authority to operate as a for-hire telecommunications carrier under state common law.

The NTA and the NCCA have properly sought to invoke this Court's jurisdiction to review the Nebraska Supreme Court's holding that § 253(a) preempts state laws which preclude political subdivisions from receiving a permit as a telecommunications contract carrier because "[p]re-emption, the practical manifestation of the Supremacy Clause, is always a federal question." *See Davis*, 476

U.S. at 388 (emphasis added). Where, as here, a state court's ability to even reach a state law question "depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law," and this Court's "jurisdiction is not precluded." *See Id.*

Clearly, the Nebraska court's "federal-law holding is integral to the state court's disposition of the matter," and a ruling by this Court on the § 253(a) preemption issue would be "in no respect advisory." *See Id.* Accordingly, this Court has jurisdiction to review the decision below because this federal preemption issue was the threshold issue in the Nebraska court (App. 6; 265 Neb. at 75, 655 N.W.2d at 368-369), and this Court has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law." *See Reiner*, 532 U.S. at 20.

2. THE CONFLICTS BETWEEN THE NEBRASKA AND IOWA SUPREME COURTS, AND THE DISTRICT OF COLUMBIA AND EIGHTH CIRCUITS, CONCERNING THE SCOPE OF FEDERAL PREEMPTION UNDER 47 U.S.C. § 253(a), MERIT THIS COURT'S ATTENTION.

In its Brief, LES has suggested that allowing the lower courts to muddle through preemption issues arising under 47 U.S.C. § 253(a), with no guidance from this Court, may eventually limit the significance of the split of legal authority on the issue of the scope of preemption

under § 253(a). (LES's Brief, at pp. 20-22.)[3] The short answer to this contention is that this Court appears to think that a conflict among the federal circuit courts or among state courts of last resort on the same important federal question is a "compelling reason" to grant a petition for writ of certiorari. *See*, SUP. CT. R. 10 (the character of reasons the Court considers "compelling," in deciding whether to grant certiorari include that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" and that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals").

As discussed in detail in the Petition for Writ of Certiorari of the NTA and the NCCA, there is a significant conflict between the lower courts on the issue of whether § 253(a) preempts state laws which prohibit political subdivisions from providing telecommunications services. *Compare*, (App. 8-12; 265 Neb. at 76-80, 655 N.W.2d at 368-370) (Nebraska statutes which prohibit political subdivisions from providing for-hire telecommunications services are preempted by § 253(a)); and *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002) (Missouri statute which prevented municipalities and municipally-owned utilities from providing telecommunications services

[3] According to LES, any court which followed the D.C. Circuit's holding in *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (§ 253(a) does not preempt state statutes which regulate or prohibit a state political subdivision's entry into the telecommunications field) "merely parroted that decision" and did not "undertake any meaningful analysis of the preemption question." (LES's Brief, at pp. 20-21.)

are preempted by § 253(a)), *with, City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (§ 253(a) does not preempt Texas statutes which bar a political subdivision's entry into the telecommunications field); and *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa S. Ct. 1999) (§ 253(a) "does not prevent the State of Iowa from prohibiting the offering of local telephone service by its political subdivisions"). The conflict among the lower courts on this issue of national importance is real, and no amount of obfuscation by LES can make that conflict disappear.

In a further attempt to blunt the sharpness of the conflict among the lower courts, LES suggests that "any administrative issues the FCC may encounter while the" conflict among the lower courts on the scope of § 253(a) preemption somehow, inexplicably, works itself out "can be resolved by the FCC rejecting the *City of Abilene* decision." (LES's Brief, at p. 21.)[4] This suggestion borders on the ridiculous. Under LES's logic, "any administrative issues the FCC may encounter" could also be resolved by the FCC deciding to follow the *City of Abilene* decision, and rejecting the *Missouri Municipal League* decision.

While federal courts of appeals are free to disagree with each other, federal administrative agencies are not free to disregard valid judgments by the federal courts of appeals. It is established federal law that no administrative agency, including the FCC, can simply ignore a federal court judgment. *See Town of Deerfield, N.Y. v. F.C.C.*, 992

[4] The Federal Communications Commission filed a Petition for Writ of Certiorari seeking review of the decision in *Missouri Municipal League*, which is pending in this Court at Case No. 02-1386.

F.2d 420, 428 (2nd Cir. 1993) ("[n]or may an administrative agency choose simply to ignore a federal-court judgment" as judgments "'within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned *or refused full faith and credit* by another Department of Government,'" and judgments by Article III courts are not "'subject to later review or alteration by administrative action'") (emphasis added) quoting *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113-114 (1948). The FCC has petitioned this Court for a writ of certiorari to review the Eighth Circuit's decision in *Missouri Municipal League* (Case No. 02-1386) precisely because the FCC cannot choose to simply ignore the conflicting federal court judgments of the Eighth Circuit in *Missouri Municipal League* and of the D.C. Circuit in *City of Abilene*.

This case raises the same important question about the scope of federal preemption under § 253(a) of the Telecommunications Act, which the FCC has raised in Case No. 02-1386. Thus, if this Court grants review in *Nixon v. Missouri Municipal League*, Case No. 02-1238 (filed February 18, 2003), then this Petition should also be granted and this case consolidated with the *Nixon* case for briefing and oral argument on the merits.

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition for Writ of Certiorari of Petitioners the Nebraska Telecommunications Association and the Nebraska Cable Communications Association, this Court should reject LES's arguments and issue a Writ of Certiorari from

this Honorable Court to review the judgment of the Nebraska Supreme Court in *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), to resolve the conflicts between the Nebraska and Iowa Supreme Courts, and between the District of Columbia and Eighth Circuits, concerning the important federal question of whether 47 U.S.C. § 253(a) was intended by Congress to infringe upon the States' historic absolute discretion to control their political subdivisions.

Respectfully submitted,

Nebraska Telecommunications Association and Nebraska Cable Communications Association, Petitioners

JACK L. SHULTZ
GREGORY D. BARTON
HARDING, SHULTZ & DOWNS
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

Counsel of Record for Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association